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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JEROME BABINEAU,
12 CDCR #V-87829,

13 Plaintiff,

14
15 vs.
16

17 DANIEL PARAMO, Warden;
18 UNKNOWN, Correctional Officers,

19 Defendants.
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21

Civil No. 14cv0447 GPC (WVG)

22 **ORDER:**

23 **(1) GRANTING PLAINTIFF'S**
24 **MOTION TO PROCEED**
25 ***IN FORMA PAUPERIS***
26 **(ECF Doc. No. 2)**

27 **AND**

28 **(2) SUA SPONTE DISMISSING**
COMPLAINT FOR FAILING
TO STATE A CLAIM
PURSUANT TO
28 U.S.C. §§ 1915(e)(2)(B)(ii)
AND 1915A(b)(1)

23 Jerome Babineau, ("Plaintiff"), currently incarcerated at Richard J. Donovan
24 Correctional Facility ("RJD") in San Diego, California, and proceeding pro se, has filed
25 a civil rights complaint pursuant to 42 U.S.C. § 1983 (ECF Doc. No. 1) ("Compl.").

26 Plaintiff claims the Warden of RJD, and unknown correctional employees "on
27 duty" at RJD, violated his Eighth Amendment rights in December 2012, by failing to
28 protect him from attack by a fellow inmate, and thereafter failing to provide him with

1 prompt and adequate medical care. *See* Compl. at 2-3. Plaintiff seeks declaratory relief,
2 as well as compensatory damages, and attorney's fees.¹ *Id.* at 4.

3 Plaintiff has not prepaid the civil filing fee; instead he has filed a Motion to
4 Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) (ECF Doc. No. 2).

5 **I. PLAINTIFF'S MOTION TO PROCEED IFP**

6 All parties instituting any civil action, suit or proceeding in a district court of the
7 United States, except an application for writ of habeas corpus, must pay a filing fee. *See*
8 28 U.S.C. § 1914(a).² An action may proceed despite the plaintiff's failure to prepay the
9 entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*
10 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if the plaintiff is a
11 prisoner and is granted leave to proceed IFP, he nevertheless remains obligated to pay
12 the entire fee in installments, regardless of whether his action is ultimately dismissed. *See*
13 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

14 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act
15 ("PLRA"), a prisoner seeking leave to proceed IFP must also submit a "certified copy of
16 the trust fund account statement (or institutional equivalent) for . . . the six-month period
17 immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *Andrews*
18 *v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement,
19 the Court must assess an initial payment of 20% of (a) the average monthly deposits in
20 the account for the past six months, or (b) the average monthly balance in the account
21 for the past six months, whichever is greater, unless the prisoner has no assets. *See* 28
22 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the
23 prisoner must collect subsequent payments, assessed at 20% of the preceding month's

24
25 ¹ Because Plaintiff is proceeding in pro se, he is not entitled to attorneys fees even if he
26 were to eventually prevail. *See Gonzalez v. Kangas*, 814 F.2d 1411, 1411-12 (9th Cir. 1987)
(pro se civil rights litigants are not entitled to attorneys fees under 42 U.S.C. § 1988).

27 ² In addition to the \$350 statutory fee, all parties filing civil actions on or after May 1,
28 2013, must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a), (b); Judicial
Conference Schedule of Fees, District Court Misc. Fee Schedule (eff. May 1, 2013). However,
Id. the additional \$50 administrative fee is waived if the plaintiff is granted leave to proceed IFP.

1 income, in any month in which the prisoner's account exceeds \$10, and forward those
2 payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

3 In support of his IFP application, Plaintiff has submitted the certified copies of his
4 trust account statements required by 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2.
5 *Andrews*, 398 F.3d at 1119. The Court has reviewed Plaintiff's trust account statements,
6 as well as the attached prison certificate issued by a trust account official at RJD where
7 he is currently incarcerated verifying his account history and available balances.
8 Plaintiff's statements show an average monthly balance of \$15.18, average monthly
9 deposits of \$37.15, and an available balance of \$18.94 in his account at the time of filing.
10 Based on this financial information, the Court GRANTS Plaintiff's Motion to Proceed
11 IFP (ECF Doc. No. 2) and assesses an initial partial filing fee of \$7.43 pursuant to 28
12 U.S.C. § 1915(b)(1).

13 However, the Secretary of the California Department of Corrections and
14 Rehabilitation, or his designee, shall collect this initial fee only if sufficient funds in
15 Plaintiff's account are available at the time this Order is executed pursuant to the
16 directions set forth below. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event
17 shall a prisoner be prohibited from bringing a civil action or appealing a civil action or
18 criminal judgment for the reason that the prisoner has no assets and no means by which
19 to pay the initial partial filing fee."); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C.
20 § 1915(b)(4) acts as a "safety-valve" preventing dismissal of a prisoner's IFP case based
21 solely on a "failure to pay . . . due to the lack of funds available to him when payment is
22 ordered."). The remaining balance of the \$350 total fee owed in this case shall be
23 collected and forwarded to the Clerk of the Court pursuant to the installment payment
24 provisions set forth in 28 U.S.C. § 1915(b)(1).

25 **II. INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(B)(ii) AND 1915A(b)(1)**

26 **A. Standard of Review**

27 Notwithstanding IFP status or the payment of any partial filing fees, the PLRA
28 also obligates the Court to review complaints filed by all persons proceeding IFP and by

1 those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of,
 2 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
 3 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
 4 practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
 5 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions
 6 thereof, which are frivolous, malicious, fail to state a claim, or which seek damages from
 7 defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v.*
 8 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v.*
 9 *Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

10 All complaints must contain “a short and plain statement of the claim showing that
 11 the pleader is entitled to relief.” FED.R.CIV.P. 8(a)(2). Detailed factual allegations are
 12 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by
 13 mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
 14 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining
 15 whether a complaint states a plausible claim for relief [is] ... a context-specific task that
 16 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*
 17 The “mere possibility of misconduct” falls short of meeting this plausibility standard.
 18 *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

19 “When there are well-pleaded factual allegations, a court should assume their
 20 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
 21 *Iqbal*, 556 U.S. at 679; *see also Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)
 22 (“[W]hen determining whether a complaint states a claim, a court must accept as true all
 23 allegations of material fact and must construe those facts in the light most favorable to
 24 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that
 25 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

26 However, while the court “ha[s] an obligation where the petitioner is pro se,
 27 particularly in civil rights cases, to construe the pleadings liberally and to afford the
 28 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.

2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not, in so doing, “supply essential elements of claims that were not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss.” *Id.*

B. 42 U.S.C. § 1983

“Section 1983 creates a private right of action against individuals who, acting under color of state law, violate federal constitutional or statutory rights.” *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred.” *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal quotation marks and citations omitted). “To establish § 1983 liability, a plaintiff must show both (1) deprivation of a right secured by the Constitution and laws of the United States, and (2) that the deprivation was committed by a person acting under color of state law.” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

C. Respondeat Superior and Individual Liability

Plaintiff names as Defendants Daniel Paramo, the Warden of RJD, and other “unknown defendants” whom he describes only as “correctional officers who were “on duty” when his Eighth Amendment rights were allegedly violated. *See* Compl. at 1-2. However, his Complaint contains no factual allegations to show that either Warden Paramo himself, or any individual RJD correctional officer, actually knew of or took part in violating his constitutional rights. “Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each government-official defendant, through the official’s own individual actions, has violated the Constitution.” *Iqbal*, 556 U.S. at 676; *see also Jones v. Community Redevelopment Agency of City of Los Angeles*, 733 F.2d 646, 649 (9th Cir. 1984) (even pro se plaintiff must “allege with at least some degree of particularity overt acts which defendants engaged in” in order to state a claim).

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1 As currently pleaded, it appears Plaintiff seeks to hold the Warden liable based
2 only on his general responsibility for the well-being of all prisoners, and because as
3 Warden, Paramo must ensure safe conditions and “carry out [...] dictates and policies”
4 at RJD. *See* Compl. at 2. Plaintiff includes no details, however, as to what Paramo or
5 any RJD correctional officer “on duty” specifically did, or failed to do, which resulted
6 in a constitutional violation. *Iqbal*, 556 U.S. at 678 (noting that FED.R.CIV.P. 8
7 “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation,”
8 and that “[t]o survive a motion to dismiss, a complaint must contain sufficient factual
9 matter, accepted as true, to ‘state a claim for relief that is plausible on its face.’”) (quoting *Twombly*, 550 U.S. at 555, 570).

11 To the extent it appears Plaintiff seeks to hold *any* person liable for causing him
12 harm, his pleading must contain sufficient “factual content that allows the court to draw
13 the reasonable inference that the defendant is liable for the misconduct alleged,” *Iqbal*,
14 556 U.S. at 678, and include a description of personal acts by each individual defendant
15 which show a direct causal connection to a violation of specific constitutional rights.
16 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor is only liable for the
17 constitutional violations of his subordinates if the supervisor participated in or directed
18 the violations, or knew of the violations and with deliberate indifference, failed to act to
19 prevent them. *Wilson v. Seiter*, 501 U.S. 294, 303 (1991); *Taylor*, 880 F.2d at 1045. If
20 there is no affirmative link between a defendant’s conduct and the alleged injury, as there
21 is none alleged here, there is no violation of the Constitution. *Rizzo v. Goode*, 423 U.S.
22 362, 370 (1976). “Causation is, of course, a required element of a § 1983 claim.” *Estate*
23 *of Brooks v. United States*, 197 F.3d 1245, 1248 (9th Cir. 1999). “The inquiry into
24 causation must be individualized and focus on the duties and responsibilities of each
25 individual defendant whose acts or omissions are alleged to have caused a constitutional
26 deprivation.” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo*, 423 U.S.
27 at 370-71).

28 / / /

1 Based on these pleading deficiencies, the Court finds Plaintiff has failed to state
 2 a claim against any person, and his Complaint therefore requires dismissal in its entirety
 3 pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1). *See Lopez*, 203 F.3d at
 4 1126-27; *Resnick*, 213 F.3d at 446.

5 **D. Cruel and Unusual Punishment Claims**

6 Even if Plaintiff had alleged facts sufficient to show that any individual person
 7 named as a defendant could be held liable under § 1983, his Complaint stills fails to
 8 “contain sufficient factual matter, accepted as true, [that] ‘state[s] a claim to relief that
 9 is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

10 For example, Plaintiff claims he was attacked by fellow inmates on or about
 11 December 18, 2012, and “the officers on duty did not protect [him] from the attack.” *See*
 12 Compl. at 2. Plaintiff further claims that after the incident, unidentified prison officials
 13 collected his clothing for purposes of “conducting an internal investigation,” and left him
 14 to “ambulate in a pair of shower shoes” which caused him to fall and fracture his hip on
 15 December 24, 2012. *Id.* at 3. Plaintiff claims to have spent “four (4) hours in
 16 excruciating agony” after the fall, but was told, again by unidentified officers, that he
 17 would have to “wait for the next shift.” *Id.*

18 “The treatment a prisoner receives in prison and the conditions under which he is
 19 confined are subject to scrutiny under the Eighth Amendment.” *Farmer v. Brennan*, 511
 20 U.S. 825, 832 (1994) (citing *Helling v. McKinney*, 509 U.S. 25, 31 (1993)). Prison
 21 officials have a duty to take reasonable steps to protect inmates from physical abuse.
 22 *Farmer*, 511 U.S. at 833; *Hoptowit v. Ray*, 682 F.2d 1237, 1250-51 (9th Cir. 1982). To
 23 plead a violation of this duty, however, the prisoner must allege facts sufficient to show
 24 that an individual prison official was “deliberately indifferent to a serious threat to [his]
 25 safety.” *Farmer*, 511 U.S. at 834. The question under the Eighth Amendment is whether
 26 the official, acting with deliberate indifference, exposed the plaintiff to a sufficiently
 27 substantial ‘risk of serious damage to his future health’” *Farmer*, 511 U.S. at 843
 28 (citing *Helling*, 509 U.S. at 35). The Supreme Court has explained that “deliberate

1 indifference entails something more than mere negligence . . . [but] something less than
 2 acts or omissions for the very purpose of causing harm or with the knowledge that harm
 3 will result.” *Id.* at 835. The Court defined this “deliberate indifference” standard as
 4 equal to “recklessness,” in which “a person disregards a risk of harm of which he is
 5 aware.” *Id.* at 836-37.

6 Thus, to state an Eighth Amendment claim based on either his attack on December
 7 18, 2012, or the timely medical attention he claims to have been denied on December 24,
 8 2012, Plaintiff’s Complaint must contain not just the “labels and conclusions” it
 9 currently does invoking “freedom from cruel and unusual punishment,” Compl. at 2-3,
 10 but some “further factual enhancement,” *Iqbal*, 556 U.S. at 678, to show that each
 11 individual person he seeks to hold liable under § 1983 knew he faced an objectively
 12 serious risk to his safety or health, and also “inferred that substantial harm might result
 13 from the risk.” *Wallis v. Baldwin*, 70 F.3d 1074, 1077 (9th Cir. 1995).

14 Without more, however, the Court finds that as currently pleaded, Plaintiff’s
 15 Eighth Amendment claims contain only the “[t]hreadbare recitals of the elements of a[n]
 16 Eighth Amendment] cause of action,” are “supported by mere conclusory statements,”
 17 and therefore, “do not suffice” to “state a claim to relief that is plausible on its face.”
 18 *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555, 570); *Lopez*, 203 F.3d at 1126-
 19 27; *Resnick*, 213 F.3d at 446. Nonetheless, because Plaintiff is proceeding in pro se, and
 20 he has now been provided with “notice of the deficiencies in his complaint,” the Court
 21 will also grant him an opportunity to effectively amend. *See Akhtar v. Mesa*, 698 F.3d
 22 1202, 1212 (9th Cir. 2012) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir.
 23 1992)).³

24
 25 ³ Finally, the Court notes that while Plaintiff need not allege in his Complaint that he has
 26 exhausted all administrative remedies as are available pursuant to 42 U.S.C. § 1997e(a), *see*
 27 *Jones v. Bock*, 549 U.S. 199, 216 (2007) (concluding that the “failure to exhaust is an affirmative
 28 defense under the PLRA, and . . . inmates are not required to specially plead or demonstrate
 exhaustion in their complaints.”), the face of Plaintiff’s current pleading suggests his Eighth
 Amendment claims may *not* have been “properly” exhausted prior to the initiation of this suit.
See Compl. at 3-4 (noting that Plaintiff spoke “to his counselor” and “fil[ed] appropriate prison
 appeal paperwork,” but “received no response from and prolonged the time from the
 occurrence.”). Plaintiff is hereby advised that “[t]he available remed[y] must be ‘exhausted’

1 **III. CONCLUSION AND ORDER**

2 Good cause appearing, **IT IS HEREBY ORDERED** that:

3 1. Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF
4 Doc. No. 2) is **GRANTED**.

5 2. The Secretary of the California Department of Corrections and
6 Rehabilitation, or his designee, shall collect the \$7.43 initial filing fee assessed by this
7 Order from Plaintiff's prison trust account, and shall forward the remaining \$342.57
8 balance of the full fee owed by collecting monthly payments from Plaintiff's account in
9 an amount equal to twenty percent (20%) of the preceding month's income and shall
10 forward payments to the Clerk of the Court each time the amount in the account exceeds
11 \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE
12 CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS
13 ACTION.

14 3. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey
15 A. Beard, Secretary, California Department of Corrections and Rehabilitation, P.O. Box
16 942883, Sacramento, California, 94283-0001.

17 **IT IS FURTHER ORDERED** that:

18 4. Plaintiff's Complaint is **DISMISSED** without prejudice for failing to state
19 a claim pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1); and


20 5. Plaintiff is **GRANTED** forty-five (45) days leave from the date of this
21 Order in which to file a First Amended Complaint which cures all the deficiencies of
22 pleading noted above. Plaintiff's Amended Complaint must be complete in itself without
23 reference to his original pleading. *See* S.D. CAL. CIVLR 15.1; *Hal Roach Studios, Inc.*
24 *v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) ("[A]n amended
25 pleading supersedes the original."); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987)

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27 *before* a complaint under § 1983 may be entertained." *McKinney v. Carey*, 311 F.3d 1198, 1199
28 (9th Cir. 2002) (quoting *Booth v. Churner*, 523 U.S. 731, 738 (2001) (emphasis added)). "Proper
exhaustion demands compliance with an agency's deadlines and other critical procedural rules."
Woodford v. Ngo, 548 U.S. 81, 90 (2006).

1 (citation omitted) (“All causes of action alleged in an original complaint which are not
2 alleged in an amended complaint are waived.”).

3 If Plaintiff fails to file an Amended Complaint within the time provided, this civil
4 action shall remain dismissed without prejudice and without further Order of the Court
5 based on Plaintiff’s failure to state a claim upon which relief can be granted pursuant to
6 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1).

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8 DATED: July 14, 2014

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10 HON. GONZALO P. CURIEL
11 United States District Judge
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